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May 30, 1996

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FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

Mr. William F. Caton
Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

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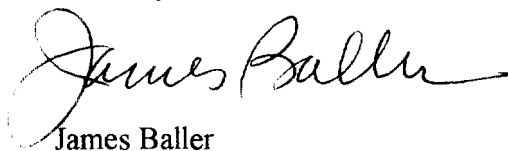
Re: In the Matter of Implementation of the Local Competition
Provisions of the Telecommunications Act of 1996
CC Docket No. 96-98

Dear Secretary Caton:

Enclosed are an original and sixteen copies of the rEPLY Comments of the American Public Power Association in the rulemaking referenced above.

As requested in paragraph 292 of the Commission's Notice of Proposed Rulemaking, we are also sending a hard copy and an electronic copy on diskette to Janice Myles, Federal Communications Commission, Common Carrier Bureau, 1919 M Street, N.W., Room 544, Washington, D.C. 20554.

Sincerely,



James Baller

cc: International Transcription Service

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C. 20554

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MAY 30 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of:

Implementation of the Local
Competition Provisions of the
Telecommunications Act of 1996

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CC Docket No. 96-98

To the Commission:

**REPLY COMMENTS OF THE
AMERICAN PUBLIC POWER ASSOCIATION**

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AMERICAN PUBLIC POWER ASSOCIATION

May 30, 1996

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**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

To the Commission:

**REPLY COMMENTS OF THE
AMERICAN PUBLIC POWER ASSOCIATION**

In its opening comments, the American Public Power Association (APPA) urged the Commission to interpret every provision of the Telecommunications Act of 1996 in this and other rulemaking proceedings in the way that would most forcefully encourage consumer-owned electric utilities to provide or foster competition in the telecommunications industry, as they have done with great success in the electric power industry for the last century. APPA maintained that congressional intent to encourage consumer-owned electric utilities to play a vital role in building the National Information Infrastructure is reflected throughout the Act and its legislative history and should therefore come to pervade the Commission's regulations as well. APPA illustrated these points by discussing the Act's key definitions, the Act's broad measures for preempting state and local requirements that might discourage electric utilities from providing telecommunications services, and the Act's extension and reinforcement of the exemption from regulation of poles, attachments and rights of way that consumer-owned utilities have historically had.

Having reviewed the opening comments filed by numerous other participants in this proceeding, APPA has found none that directly or indirectly opposes the points that APPA has made.

To the contrary, several commenters confirmed one or more of APPA's positions. For example, UTC, The Telecommunications Association, representing approximately 1000 privately-owned and consumer-owned utilities and pipelines on telecommunications matters, played a prominent role in the congressional debates that led to the key definitions in the Act. In its comments, UTC interpreted these definitions in precisely the same way as APPA. Similarly, like APPA, numerous commenters urged the Commission to interpret the preemption provisions of the Act broadly in order to promote competition in the telecommunications industry. Likewise, the "Municipal Utilities" reinforced APPA's points about the extension of the consumer-owned electric utilities' exemption from regulation of poles, attachments and rights of way.

APPA's Reply Comments

In addition to the comments that APPA has already presented to the Commission, it offers the following points in response to opening comments filed by certain other parties to this proceeding.

As the Commission knows better than anyone else, the challenge of establishing a competitive telecommunications industry is a daunting one that is fraught with danger. For all concerned, including the Commission, the stakes and risks are high, and any errors made now could have serious long-term consequences. In many cases, the issues at hand are so multi-faceted and dynamic that they do not lend themselves to general prescriptions. At the same time, a period of experimentation and observation would greatly enhance the Commission's decision-making. In the context of this proceeding, APPA urges the Commission to defer issuing specific rules or guidelines at this time and to proceed instead on a case-by-case basis in the following two areas.

1. The Commission Should Not Issue Specific Rules or Guidelines on Preemption at this Time in the Context of this Proceeding

Noting that the Commission has not proposed specific rules or guidelines to define the scope of the preemption provisions in Section 253 of the Act, a handful of commenters have urged the Commission to do so in this proceeding. For example, Cox Communications suggests that the Commission use its general rulemaking powers to issue regulations that would spell out the “types” of state and local requirements that would be permissible or impermissible. Cox’s Comments at 55-59. According to Cox, this would reduce the number of case-by-case adjudications and would render those that do occur simpler for the Commission to decide. *Id.* Similarly, the National Cable Television Association (NCTA) states that the Commission “can and should rule now that burdensome certification proceedings and geographic service requirements constitute effective barriers to entry. Providing this guidance now would reduce regulatory costs and minimize case-by-case litigation.” NCTA’s Comments at 68-72. While APPA supports Cox’s and NCTA’s goals, it agrees with the Municipal Utilities’ point that the Commission should not issue rules or guidelines in this proceeding but should address preemption issues on a case-by-case basis.

At the outset, Section 253(d) of the Act itself prescribes the method by which the Commission must address preemption issues -- notice-and-comment proceedings on a case-by-case basis. This requirement of a hybrid of adjudication and rulemaking procedures reflects Congress’s recognition that the Commission’s preemption decisions are likely to be highly sensitive, with potentially far-reaching results. They should therefore be based on specific facts rather than abstractions, and all interested parties should have an opportunity to participate by filing comments. The Commission should honor both the letter and spirit of Section 253(d), even if some delays inevitably occur.

Second, Section 253(b) states that nothing in the Act is intended to preclude States from issuing “competitively neutral” requirements that would “preserve and advance universal service, protect public safety and welfare ensure the continued quality of telecommunications services, and safeguard the rights of consumers.” As these exceptions to the Act’s preemption provisions are inherently fact-specific, any attempt to promulgate a comprehensive set of detailed rules or guidelines would inevitably fall short and would surely spawn precisely the kind of costly and time-consuming litigation that the rules or guidelines were intended to prevent or minimize. At the same time, little purpose would be served by issuing broad, general rules or guidelines, as the Act and its legislative history have already achieved that end by making clear that the Commission should be vigilant in eliminating state and local requirements that explicitly or implicitly impose barriers to entry.

Third, even if it made sense for the Commission to issue rules or guidelines at some point, the record in this proceeding would not support doing so at this time. The Commission did not publish any specific proposed rules or guidelines, nor did it give the relevant issues more than fleeting attention in its Notice of Proposed Rulemaking. As a result, very few commenters addressed the preemption issue at all, and none purported to do so comprehensively. In these circumstances, any rules that the Commission issued would be subject to legal challenge, and even guidelines would be of questionable legality. APPA therefore submits that, if the Commission believes issuing detailed rules or guidelines would be desirable, it should initiate a specific proceeding for that purpose.

At a minimum, if the Commission decides to go forward with rules or guidelines at this time, it should make clear that they are for illustrative purposes only.

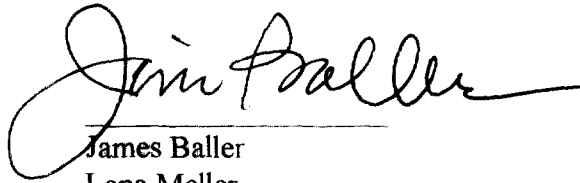
2. The Commission Should Not Issue Specific Rules or Guidance in This Proceeding to Define the Scope of the Access Provisions of the Act as Applied to Electric Utilities

As APPA discussed in its opening comments, its members are generally exempt from the access and other requirements added to Section 224 of the 1934 Act by Section 703 of the 1996 Act. Nevertheless, on the basis of its vast experience with electric power, APPA agrees with the comments that UTC, Municipal Utilities and numerous other electric utilities that have filed to urge the Commission to give electric utilities broad latitude in determining when granting access to their poles, attachments, conduits, ducts and rights of way would threaten the safety or reliability of their electric service. Furthermore, APPA agrees with these commenters that the circumstances in which such questions may arise are so diverse and complex that the Commission should not seek to establish rules of general applicability but should instead adopt rules that encourage good-faith negotiations among interested parties and provide for case-by-case determinations if the negotiations fail to produce mutually satisfactory results.

Conclusion

As stated in APPA's opening comments, the Commission should do everything in its power to encourage consumer-owned electric utilities to play an important role in bringing competition to the emerging field of telecommunications. At the very least, the Commission should do nothing to discourage such involvement. APPA submits that, taken as a whole, the opening comments filed in this proceeding either affirmatively support APPA's position or are not inconsistent with it.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jim Baller". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

James Baller

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